No. 17-8151

IN THE

Supreme Court of the United States

RUSSELL BUCKLEW,

Petitioner,

v.

ANNE PRECYTHE, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Eighth Amendment commits state officials to take the steps reasonably necessary to avoid predictable cruelty when administering punishment. It does so not only for the benefit of those whom we punish. Just as importantly, it preserves the basic human dignity and decency of society itself. *Coppedge v. United States*, 369 U.S. 438, 449 (1962) ("The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."); *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion) (the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man").

Respondents ask this Court to endorse procedural and substantive rules of law that shirk their responsibilities to avoid needless suffering in carrying out executions. As a matter of procedure, respondents go beyond the Eighth Circuit's erroneous view that courts should assume that an execution of an inmate with a rare medical condition will go as planned. They advocate standards that will conceal, from both courts and the state officials charged with administering humane punishment, the readily available facts that demonstrate an intolerably high and objective risk of suffering. As a matter of substance, they would reward the ignorance of state officials by requiring an inmate to prove state officials' "subjective culpability" in carrying out an execution. Resp. 45; *id.* 39 (arguing that any unplanned event in an execution with "safeguards" cannot be cruel because such events are not intended or the result of bad faith); *id.* 46 (arguing that the Constitution prohibits only the infliction of pain for pain's sake).

This is a recipe for all-too-frequent catastrophe. It encourages state officials to remain ignorant of the particular risks an inmate's medical condition presents and then rely on the fact that they would be "surprised" by any (in fact predictable and even likely) "mishap" as reason to allow the execution to proceed. This Court should not endorse such indifference to grave risks and cripple the capacity of inmates to demand that state officials do anything about them. Under respondents' view, botched executions, while not certain, will not be surprising either. Our Constitution demands more.

Respondents would also shirk their responsibilities when it comes to designing an alternative method of execution. They offer no reason to place the burden on an inmate raising an as-applied challenge to his method of execution. And they ask this Court not only to impose the requirement on such inmates, but also to construe it to require the inmate to propose a protocol at a level of detail that exceeds Missouri's own protocol. Inmates cannot and should not be required to bear such a heavy burden.

Once again, the result of respondents' view would be predictably cruel executions. As respondents would have it, state officials can *know* that an inmate's medical condition means that executing him by the state's generally applicable method would produce excruciating pain, yet those same officials nonetheless will not be deemed to *intend* that suffering unless the inmate proves a readily available (highly detailed) alternative. Resp. 44–47. In respondents' hands, the alternative method requirement amounts to cruelty-laundering. Our Constitution demands more.

If this Court chooses to extend the alternative method requirement to as-applied challengers, then it

should conclude that petitioner has produced enough evidence to warrant a trial. Respondents have repeatedly failed to seek summary judgment on the ground that lethal gas is not readily available, and this Court should not rule on that basis now. In any event, lethal gas is readily available to respondents. The fact that they have chosen not to undertake serious efforts to design a protocol for it does not make it any less readily available to them. And the record reasonably supports the conclusion that lethal gas would pose substantially fewer risks to someone with petitioner's condition than would lethal injection.

I. COURTS SHOULD NOT ASSUME BUCKLEW'S EXECUTION WILL GO AS PLANNED.

The Eighth Circuit assumed a lethal injection execution of Bucklew would go as planned, and so refused to allow discovery into M2's and M3's knowledge, experience, and ability to respond to the predictable and serious risks Bucklew faces. J.A. 871. Respondents defend that legal standard by defining any unintended event in an execution as the kind of "isolated mishap[]" that does not implicate the Eighth Amendment. Resp. 38. That is not and should not be the law.

It makes no sense to assume all will go as planned when considering an as-applied challenge based on an inmate's rare medical condition. Bucklew's challenge is not that Missouri's protocol cannot work humanely for *anyone*, and it is not that the protocol lacks safeguards that reduce risks to healthy inmates. Resp. 39–40. Bucklew argues that what we know about his medical condition and what we know from Missouri's execution protocol combine to raise a constitutionally intolerable risk of needless suffering *for him* that respondents must address. Br. 27–28.

Respondents never confront that argument. They offer no reason to follow their implicit suggestion to treat Bucklew's as-applied challenge the same as a facial challenge: simply evaluate Missouri's "safeguards" in a vacuum and declare them "adequate."

Respondents' approach would endorse studied indifference to readily knowable risks of executing an inmate with a rare medical condition. Br. 28–30. Respondents point out that Bucklew has not pursued the "deliberate indifference" count in his complaint. Resp. 51. But that is irrelevant. The claim he has pursued asserts that respondents cannot disregard the knowable and known risks his condition presents.

1. *Respondents unreasonably disregard the risks to Bucklew.* — Respondents confirm that their position depends on an unrealistic view of the risks Bucklew faces when they describe the record concerning those risks. For example, respondents claim that the medical professionals on the execution team "'receive the inmate's medical records' before the execution, not just a one-page summary of his health condition." Resp. 6 (alterations and citation omitted). Put aside that this stray comment, even if true, says nothing about how much time medical team members would have to review Bucklew's voluminous records; the comment provides no reason to believe M2 and M3 can meaningfully process the records before carrying out the execution. J.A. 627. More fundamentally, there is no reason to believe the statement is true. Respondents quote an official who did not know "what information is shared between the [medical] staff and the execution team members." J.A. 622. By contrast, the official who actually "meet[s] with the execution team members in advance," J.A. 511, testified that he provides the execution team the one-page medical summary and *nothing else*, J.A. 528.

Respondents also pretend there is no evidence that gaining venous access poses serious risks to Bucklew. Resp. 12, 53. Respondents now claim peripheral venous access is likely, even though *both* experts who examined Bucklew's veins acknowledged reasons to doubt successful peripheral access. J.A. 231, 332. Respondents assert, based on generic testimony about human anatomy and not any evidence regarding Bucklew, that access through his foot might be possible. J.A. 337. Respondents also note that Bucklew had an IV inserted for medical procedures, including for a recent tracheotomy this past summer. Resp. 12–13. This Court should not mistake this for reason to believe that medical professionals recently gained stable access to Bucklew's vein without incident and substantial delay. Bucklew's medical records from this summer's treatment would show whether that is so. Respondents, who opposed Bucklew's request to lodge a relevant portion of those records, had not reviewed them when they wrote their brief, and believe this Court should not review them either. Wishful thinking is not evidence, and no basis to allow a risky execution to proceed.

Respondents also assert that all anesthesiologists can access central veins, and that even inexperienced anesthesiologists access central veins successfully on the first try 90 percent of the time. Resp. 6, 53.[1] Yet the State's own execution protocol contemplates that medical personnel may *not* have the training or expe-

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[1] There is no evidence that inexperienced anesthesiologists can access a central vein "on the first attempt 90 percent of the time." Resp. 53. Dr. Zivot testified that when he was a trainee, he failed to access a central line approximately 33 percent of the time; as he grew more experienced, his failure rate dropped to approximately 10 percent, but even then a "success" might involve up to ten attempts. J.A. 185–86.

rience to do so. J.A. 214 (authorizing medical personnel to access a central line *if* they "have appropriate training, education, and experience"). Witnesses confirmed that not all medical personnel, or even all anesthesiologists, are qualified and skilled at performing the central line procedure. J.A. 336, 462. Respondents also deny any concern about using the painful and outdated cut-down procedure. Resp. 53. But the particular medical personnel who would be charged with obtaining venous access in Bucklew's execution have resorted to a cut-down in the past. J.A. 615–16. And a medical kit to perform a cut-down is in the execution chamber, presumably in case the execution team decides to do one. J.A. 616–18.

Finally, respondents assert that once the lethal drug is pushed, there is no evidence Bucklew faces a substantial risk of suffering. Respondents write as if their expert's testimony was undisputed. Resp. 37. But not even Dr. Antognini shares respondents' confidence. Even he testified that it could be *longer* than 20 to 30 seconds. J.A. 432. More importantly, Dr. Zivot disagrees with Dr. Antognini's 20 to 30 second estimate. And Dr. Zivot's view is not simply based on a study about horses; he cited that study only to explain why Dr. Antognini's view should be doubted. J.A. 195. When it comes to the basis for his prediction that Bucklew will remain sensate to pain for several minutes, he relied on his decades of experience as an anesthesiologist. J.A. 222. Moreover, respondents ignore substantial evidence from Dr. Zivot that the pain Bucklew will face includes choking and gagging on his own blood, which is likely to begin even before the lethal drugs are pushed. J.A. 226, 232–33.

Respondents also point to "witness accounts of executions," but these, too, undermine respondents' assertion. Many witnesses observed that it took

minutes, and not seconds, for the drug to take effect. J.A. 324–25. There is ample reason to believe Bucklew faces a substantial risk of severe pain and suffering.

Respondents' one-sided presentation of the record underscores why denial of discovery into the skills, training, and abilities of M2 and M3 was so wrongful. Only M2 and M3 can explain how much about an inmate's medical history they know when they begin an execution or whether they know anything about cavernous hemangioma as Bucklew presents it. Only M2 and M3 can explain whether and under what circumstances they will use a cut-down. Only M2 and M3 can explain what they would do during an execution when an inmate began choking on blood leaking from a tumor in his throat. The record makes clear that the risks Bucklew faces of being executed by a poorly informed and unprepared execution team is substantial. Discovery will further illuminate the full extent of those risks.

While respondents wrongly assert that "additional discovery" regarding M2 and M3 was unjustified, they never even try to explain why Bucklew could not use discovery of M2 and M3 from prior cases. Bucklew's appointed counsel, who has seen that evidence, has made clear that she believes it is germane to the issues here. Barring use of that testimony in this case is indefensible.

Finally, the assertion that Bucklew never proposed a suitable fact-finding procedure regarding M2 and M3 that would preserve their anonymity is baseless. APP0224–25 (stating documents needed could be produced "with identifying information redacted").

2. *Respondents' view short-circuits the adversarial process where it is needed most.* — The discovery

Bucklew seeks is critical to ensure that the adversarial process achieves its truth-seeking function. Respondents suggest that Bucklew has been abusing the litigation process by constantly revising his claim. Resp. 9–14. But their view reflects a misunderstanding of the litigation process, Bucklew's claim, and their legal obligations to avoid inflicting cruelty upon him.

The operative complaint identified Bucklew's risk of choking on blood leaking from his tumors during the execution, especially when lying flat. J.A. 43–48, 52, 56–59, 66–67, 69–71, 73–74, 78, 85. It is not surprising, in fact it is routine, for plaintiffs to obtain information through discovery that fills out details not included in the "short and plain statement" of their claims. Fed. R. Civ. P. 8. It is also routine for plaintiffs to obtain information through discovery that results in abandoning theories of liability pled in the complaint. It is likewise routine for plaintiffs and defendants to find ways to resolve disputes with respect to parts of a claim while continuing to litigate others. Respondents suggest that the unfolding of the litigation process here somehow reflects Bucklew shifting his theories of liability. *See generally* Resp. 9–14. That is wrong.

It is also ironic. The occasional (inadequate) effort by respondents to acknowledge Bucklew's concerns has been the result of litigation. Respondents abandoned the use of methylene blue during this litigation. Dkt. 199-1.[2] Respondents' late and inadequate assurance, offered by someone with unclear authority and only in response to Bucklew's Eighth Circuit rehearing petition, that Bucklew will not be required to

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[2] "Dkt." citations refer to entries on the district court's docket, No. 4:14-cv-08000 (W.D. Mo. filed May 9, 2014).

lie "fully supine" during the execution was a product of this litigation. Moreover, Bucklew's condition is progressive. J.A. 229, 647–48; Br. 6. So it is not at all surprising that the risks he faces have changed over time.

This case is about whether the "adversarial process" will be permitted to "test[ ] the risk" that Bucklew's serious illness will lead to needless suffering during his execution. *Hamm v. Dunn*, 138 S. Ct. 828, 828–29 (2018) (Mem.) (Ginsburg, J., dissenting); *see also Taylor v. Illinois*, 484 U.S. 400, 410–11 (1988) (adversary process cannot "function effectively without adherence to rules of procedure that . . . provide each party with a fair opportunity to assemble and submit evidence"). This Court should reject respondents' effort to create a second-class litigation process that fails to adequately probe the severity of risks an inmate with a serious illness faces from the state's preferred method of execution.

3. *Respondents' "subjectively culpable" test amounts to studied indifference to risks.* — Respondents no doubt hope all will go well. That much is clear from their one-sided view of the record. But this Court must not allow respondents' hope for a smooth execution to play any role in the adjudication of Bucklew's claim.

Respondents suggest that because they do not intend to bring about what Bucklew fears will happen during the execution, Bucklew's fears reflect only the prospect of isolated mishaps that do not concern the Eighth Amendment. Resp. 38. According to respondents, unless respondents have a "subjectively culpable" state of mind, the planned execution can proceed. *Id.* 45. Put together, these arguments amount to an ostrich defense for risky methods of execution. This Court should reject it.

Glossip v. Gross made clear that the "subjectively culpable" state of mind that warrants judicial intervention is an "objectively intolerable" risk of needless suffering. 135 S. Ct. 2726, 2737 (2015). That is, a court should evaluate what is objectively known and knowable to a reasonable official. Allowing state officials to maintain studied ignorance about risks known to others (by, for example, preventing medical personnel in the execution chamber from learning about them) would serve no Eighth Amendment value. And letting prison officials cling to subjective hope that all will go well based on the state's own expert's opinion in the face of contrary expert evidence would short-circuit the fundamental purpose of litigation: a neutral arbiter who determines the objectively knowable risk of suffering that a method of execution presents in light of the inmate's medical condition.

This Court recognizes the distinction between an "unforeseeable accident," *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) (plurality opinion), and an objectively knowable and substantial risk, *Glossip*, 135 S. Ct. at 2740. The former is not blameworthy precisely because it is unpredictable. The latter is blameworthy precisely because, though not certain, it is entirely predictable. The Eighth Amendment does not allow executions to proceed that pose an objectively intolerable risk of needless suffering, no matter how subjectively convinced prison officials are that all will go well.

II. AN AS-APPLIED CHALLENGER TO A METHOD OF EXECUTION NEED NOT PROVE AN AVAILABLE ALTERNATIVE METHOD.

Respondents offer little reason to impose on as-applied challengers the requirement of pleading and proving an available alternative. Instead, they pri-

marily assert that the Court has already decided the question. Resp. 43–44. But, as respondents acknowledge, this Court has addressed the issue only in facial challenges. *Id.* 43. The issue remains open.

This Court has already rejected the primary reason respondents offer to extend the requirement to as-applied challengers. They argue that the rationale motivating *Baze* and *Glossip*—that because capital punishment is constitutional there must be a lawful means of carrying it out—applies equally to as-applied challengers. Resp. 44. As respondents would have it, "[b]ecause capital punishment is constitutional, there must be a means of executing an individual prisoner lawfully sentenced to death." *Id.* But that is not true. The Eighth Amendment prohibits the execution of an insane man, even if he developed his mental defect *after* lawfully being tried and sentenced. *Ford v. Wainwright*, 477 U.S. 399, 401–02, 409–10 (1986). It is no threat to the death penalty to acknowledge that a man lawfully sentenced to death has *mentally* deteriorated to the point that executing him violates the Eighth Amendment. Likewise, it is no threat to the death penalty to acknowledge that a man lawfully sentenced to death has *physically* deteriorated to the point that executing him, at least by the means the state prefers, violates the Eighth Amendment.

Respondents compound their error when they argue that there can be no moral culpability in choosing to execute a lawfully sentenced inmate by the only means available. Resp. 44–47. Respondents appear to be suggesting that, if they have no choice about *how* to execute an inmate, then the fact that the only available choice will involve excruciating pain does not matter. But the unspoken premise of respondents' argument remains that the state *must* be able to car-

ry out an execution if the inmate was lawfully sentenced to death. Because that premise is false, state officials are always choosing between an execution that violates constitutional standards of cruelty and not executing the inmate at all. They remain culpable for choosing to make the inmate suffer.

Respondents' practical concerns about the length of litigation should not occupy this Court. Resp. 47–49. Respondents assert that Bucklew's claim has been frivolous from the outset. *Id.* 48. But even they have made (inadequate) changes to their plans to execute him in light of Bucklew's arguments and evidence. And their complaints that inmates' medical conditions change over time is remarkably callous. *Id.* They treat as an annoyance what should be a central concern: how an inmate's serious and progressive medical condition will affect what happens inside the execution chamber.

Respondents have thus unwittingly conceded their indifference to the challenges of executing an inmate with Bucklew's rare condition. Respondents never respond to Bucklew's argument that "indifference to an inmate's serious medical needs—and what those needs entail in connection with a method of execution—'constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment.'" Br. 44 (quoting *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Instead, they complain about having to defend their overconfidence that the execution will proceed without incident. The Eighth Amendment's respect for dignity, both the inmate's and society's, requires more.

In the end, imposing on the seriously ill inmate the burden of pleading and proving an alternative method serves no constitutional values and offers no practical benefit. Indeed, inmates face serious practical

obstacles that state officials do not. *See* Br. 52–54; *see also infra* IV.B. Respondents, not seriously ill inmates, retain the obligation to design an appropriate method of execution that is not cruel. If they fail to do so, they should not remain free to inflict an excruciating method on the inmate.

III. THE RECORD SUPPORTS THE CONCLUSION THAT LETHAL GAS WILL SUBSTANTIALLY REDUCE THE RISKS BUCKLEW FACES FROM MISSOURI'S LETHAL INJECTION PROTOCOL.

If this Court extends the alternative method requirement to as-applied challengers, it should still reverse the Eighth Circuit's decision for either of two reasons.

First, respondents do not (because they cannot) defend the Eighth Circuit's actual reasoning. The Eighth Circuit applied a novel "single-witness" requirement under which Bucklew could not prevail unless the evidence about the likely duration of his suffering from both the state's method and his alternative came through a single expert witness. Br. 47; J.A. 867–68. Respondents dodge the legal error by attempting to relitigate the facts. This Court is under no obligation to reweigh the facts. It would be entirely appropriate to correct the Eighth Circuit's legal error and remand for reconsideration under the proper standard. *See Holland v. Florida*, 560 U.S. 631, 653–54 (2010).

Second, the record supports a reasonable factfinder's conclusion that lethal gas substantially reduces the risks Bucklew faces from Missouri's lethal injection protocol. Respondents' argument to the contrary repeats its selective disregard of evidence unfavorable to its view.

Respondents first attack Dr. Zivot for not providing evidence of the risks of lethal gas. Resp. 30. But as Dr. Zivot made clear, he is ethically prohibited from opining on an alternative method of execution, including whether a different form of execution would be feasible. J.A. 219–20. *See also* Brief of American Medical Association, *Amicus Curiae* in Support of Neither Party, at 3. Regardless, there is no reason to disregard his testimony about lethal injection merely because he did not testify about lethal gas.

Respondents next turn to their own expert and try to cast doubt on his assertion that lethal gas would be "just like" lethal injection, meaning that Bucklew would experience a sense of suffocation for approximately 20-30 seconds. J.A. 456, 458, 460. Respondents strangely claim that the testimony should not be credited because Dr. Antognini did not "know how quickly a gas is introduced," which could affect the level of suffering. Resp. 30 (citing J.A. 460). But Missouri's lethal injection protocol, upon which Dr. Antognini relied, provides no information about the rate at which the drug is injected. J.A. 313–14. And, as Dr. Antognini himself testified, the actual injection rate can vary by execution because "[t]here may be issues with how fast they can inject the drug." J.A. 325. So if a reasonable factfinder could credit Dr. Antognini regarding lethal injection, as respondents concede, the factfinder could also credit him regarding lethal gas. Even more fundamentally, respondents cannot seriously be suggesting that state officials would choose a rate at which to administer the gas that would cause needless suffering. *But see* Resp. 31. Surely a reasonable factfinder could conclude that Dr. Antognini's testimony rightly assumes the state will at least try to minimize suffering.

Respondents have also ignored significant evidence indicating that lethal gas will substantially reduce the risks Bucklew faces from a lethal injection protocol *before* the lethal drug is administered. As Dr. Zivot explained, Bucklew faces a number of severe risks that stem from the difficulty the execution team will have in gaining venous access. *See supra* 5–6; Br. 10–12; J.A. 231–35. This is in addition to the risks posed by Bucklew most likely having to lie supine, strapped to a gurney. J.A. 232–33. Respondents' own expert agreed that each of these risks increases the possibility that Bucklew would experience a sense of suffocation. J.A. 442–43. All of these risks would be eliminated or at least substantially reduced through a lethal gas protocol that would require neither venous access nor that Bucklew lay supine. Respondents never acknowledge these comparative benefits.

Lastly, respondents argue that Bucklew failed to provide evidence showing that he is sure or very likely to suffer severe pain during lethal injection. Resp. 33–38. As discussed above, respondents are simply selectively presenting the evidence upon which they base their subjective hope that all will go well. *See supra* 3–7, 9–10. The district court recognized that, given the procedural posture, it would be inappropriate to simply credit respondents' evidence and reject Bucklew's. The issue warrants a trial. J.A. 827.

IV. BUCKLEW MET HIS BURDEN TO DEFEAT RESPONDENTS' MOTION FOR SUMMARY JUDGMENT REGARDING ANY COMPARISON OF LETHAL GAS AND LETHAL INJECTION.

A. Respondents Did Not Dispute That Lethal Gas Was A Feasible And Readily Available Alternative Method When Moving For Summary Judgment.

Both the district court and Eighth Circuit ruled that respondents did not contest the feasibility and availability of lethal gas. J.A. 827, 866. Both courts were correct.

Respondents' summary judgment briefing focused solely on whether Bucklew established that lethal gas would significantly reduce his risk of severe pain, not on whether lethal gas was available. Dkt. 182 at 8–9; Dkt. 200 at 6–7. So, too, did their appellate brief. Brief of Appellees at 57–61, No. 17-3052 (8th Cir. Jan. 3, 2018). On appeal, respondents also let the district court's statement on the issue stand without objection. When it came time to oppose Bucklew's petition for certiorari, they again remained silent, this time in the face of *two* court rulings stating that they did not advance the argument. BIO at i; *id.* at 31–34.

This argument has been waived, repeatedly. *See* Sup. Ct. R. 15.2; *id.* R. 24 (merits briefs may not raise additional questions or change the substance of questions presented); *United Props. Inc. v. Emporium Dep't Stores, Inc.*, 379 F.2d 55, 60 n.12 (8th Cir. 1967). Although respondents may generally advance any properly preserved argument in support of a judgment without taking a cross-appeal, *United States v. Am. Ry. Express Co.*, 265 U.S. 425, 435 (1924), this Court has declined to reach an argument

raised by the state as respondent where that argument was not made in the lower courts or in the petition stage. *See Schiro v. Farley*, 510 U.S. 222, 228–29 (1994). Put simply, respondents are raising a *new* ground for the first time in this Court. This is not a *properly preserved* alternative ground for affirmance.[3]

In any event, even assuming Bucklew must plead and prove a feasible and available alternative, the record contains ample evidence creating a triable issue of fact. Br. 51–52; J.A. 866 (Eighth Circuit noting that lethal gas is authorized in Missouri, other states have ongoing studies of the method, and "at least preliminary indications that Missouri will undertake to develop a protocol"); *Johnson v. Precythe*, No. 17-2222, 2018 WL 4055908, at *4 (8th Cir. Aug. 27, 2018) (describing Oklahoma report on nitrogen hypoxia and concluding, "[t]hat researchers have yet to decide which is the *best* among several feasible methods of implementation does not definitively refute [petitioner's] allegation that Missouri could feasibly implement this alternative without undue delay.").

B. An Inmate Challenging His Method Of Execution Need Not Detail The Protocols For His Execution.

Respondents try an end-run around the evidence that lethal gas is feasible and readily available by arguing that Bucklew never proposed a detailed protocol for how to implement the method. Resp. 25. Bucklew did not because there is no legal basis for impos-

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[3] Bucklew does not deny that, if the Court decides to extend the alternative method requirement to as-applied challengers, respondents may argue *at trial* that lethal gas is not a reasonably available alternative. The point is that they never denied that a reasonable factfinder could conclude that lethal gas is an available alternative.

ing that requirement on him. Indeed, the Eighth Circuit, when remanding his claim for litigation beyond the pleadings, specifically instructed that Bucklew "may not be permitted to supervise every step of the execution process." *Bucklew v. Lombardi*, 783 F.3d 1120, 1128 (8th Cir. 2015) (en banc). Respondents are criticizing Bucklew for failing to propose details the Eighth Circuit's mandate barred him from proposing.

Regardless, there is no basis for imposing such a burden on an inmate. Setting aside the practical constraints on inmates in developing detailed protocols, Br. 52–53, Bucklew has no constitutional right to be executed in a particular way. But he has the right, and has consistently asserted his right, *not* to be executed in an unconstitutionally cruel manner. *See Jackson v. Fair*, 846 F.2d 811, 817 (1st Cir. 1988) ("Although the Constitution does require that prisoners be provided with a certain minimum level of medical treatment, it does not guarantee to a prisoner the treatment of his choice."). To the extent the requirement is imposed on as-applied challengers at all, they should be required to do no more than identify an alternate method of execution that the state can reasonably implement. Whether and how the state chooses to do so, consistent with constitutional standards, is not a matter for the inmate to dictate.

Principles of state sovereignty support Bucklew's view. *See In re Blodgett*, 502 U.S. 236, 239 (1992) (per curiam). The state should retain the prerogative to determine what resources it wishes to devote to executions and how it will live up to its constitutional obligation to ensure humane executions. A court should not, at an inmate's direction and without giving the state an opportunity to devise a constitutional alternative, dictate one particular path. *See Hutto v. Finney*, 437 U.S. 678, 683 (1978) (noting that federal

district court "did not immediately impose a detailed remedy of its own," but instead "offered prison administrators an opportunity to devise a plan of their own for remedying the constitutional violations"); *Brown v. Plata*, 563 U.S. 493, 511 (2011). In addition, some states, including Missouri, prefer to keep a portion of their protocols secret. *See* Mo. Rev. Stat. § 546.720; *id.* § 217.075. Requiring inmates to detail their own protocol would undermine that sovereign prerogative as well.

This Court has never held that an alternate method must be available by statute or immediately available to the state. *Arthur v. Dunn*, 137 S. Ct. 725, 729 (2017) (Sotomayor, J., dissenting). And for good reason. Such a requirement would lead to arbitrary applications of the Eighth Amendment and give states the power to violate a capital inmate's constitutional rights by limiting the methods that are statutorily available or by refusing to develop or maintain the ability to carry out particular methods. Brief of Scholars and of Academics of Constitutional Law as *Amicus Curiae* in Support of Petitioner, at 16.

Here, Bucklew has proposed lethal gas as an alternate method, which Missouri allows by statute. Missouri previously employed lethal gas but has not maintained its gas chamber, nor has it developed a new protocol for lethal gas employing modern equipment. That has been Missouri's choice. But it cannot and should not be Missouri's excuse. Among other evidence, Bucklew demonstrated that other states are in the process of developing detailed protocols for execution by nitrogen hypoxia. The method is available to Missouri, should it choose to try to develop a protocol for it. *See Johnson*, 2018 WL 4055908, at *4 ("We cannot accept, however, that a State's unwillingness to employ a method that would significantly reduce a

substantial risk of severe pain makes the method infeasible."). Bucklew should be required to prove no more. Respondents' suggestion that research on lethal gas is insufficient to develop a protocol, Resp. 15, rings hollow in light of the fact that they made no meaningful effort to develop one. J.A. 489–93 (testimony that Department of Corrections employee who was previously tasked with revising Missouri's lethal injection protocol "did a little bit of research" and "read a few articles" on lethal gas because he wanted "a working knowledge" of what lethal gas "could entail," and then decided he had "hit a wall" and chose not to "really dig deeper"); *id.* 503 (testimony that Department of Corrections is capable of undertaking investigation of viability of lethal gas).

Whatever Bucklew is required to prove, it should not be more detail than Missouri provides for its lethal injection protocol. Yet respondents would require Bucklew to provide "specific details about the method, rate, quantity, quality, concentration, delivery, and timing of its administration." Resp. 26. Missouri's protocols provide no information about the rate at which the drug is injected, which Dr. Antognini opined would affect how quickly it would take effect. J.A. 313.[4] Respondents also refused to provide information on the quality and concentration of pentobarbital to avoid revealing whether Missouri uses manufactured or compounded pentobarbital. J.A. 1004. Respondents are unfairly demanding detail from Bucklew that they refuse to provide. Brief of Former Judges and Prosecutors *Amici Curiae* in Support of Petitioner, at 28–29 (describing "information

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[4] Variations in speed of administration of lethal injection may cause an inmate to react violently to the drugs. Brief of Scholars and of Academics of Constitutional Law as *Amicus Curiae* in Support of Petitioner, at 6–7.

imbalance" in requiring plaintiff to allege an alternative method where state secrecy laws prohibit disclosure of execution procedures).

V. BUCKLEW'S CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS OR *RES JUDICATA*.

Respondents' efforts to avoid this litigation through preclusion and the statute of limitations have failed at every turn. They should not short circuit this litigation now.

Bucklew did not raise his claims too late. The statute of limitations for Bucklew's as-applied challenge is five years. Mo. Rev. Stat. § 516.120(4). Respondents contend that the limitations period began to run in June 2008—before Missouri even implemented its current single-drug protocol—because Bucklew sought funding for an expert to conduct a medical examination. Resp. 54. However, that request was denied. So, too, were all seven of Bucklew's subsequent requests over the next six years. Dkt. 12 at 8–12. Only after Dr. Zivot started examining Bucklew's medical condition in April 2014 did Bucklew obtain the factual basis for his claim. J.A. 108–09.

Respondents note that Dr. Zivot did not physically examine Bucklew until May 12, 2014, three days after Bucklew filed his initial complaint. Resp. 55–56. But that physical examination was just one piece of Dr. Zivot's review. Before Bucklew filed his initial complaint, Dr. Zivot examined Bucklew's medical records through February 2014. Zivot Decl. ¶ 8, Dkt. 1-1. Those records showed that Bucklew's condition, which is progressive, J.A. 328, 648–49, had sufficiently deteriorated to support a viable Eighth Amendment claim challenging Missouri's lethal injection plan. *Compare* J.A. 644–46 (in April 2012, Bucklew

was not yet at risk of serious hemorrhage) *with* J.A. 647–48 (in October 2013, Bucklew's hemangioma had increased in size). Dr. Zivot's subsequent physical examination both reaffirmed the viability of Bucklew's claim and strengthened it. Bucklew's claim was timely filed in May 2014. *Wallace v. Kato*, 549 U.S. 384, 388 (2007).

Respondents' *res judicata* argument similarly fails. Respondents contend that Bucklew should have raised his as-applied challenge in an earlier case, *Zink v. Lombardi*, No. 2:12-cv-04209 (W.D. Mo. filed Aug. 1, 2012), which involved a facial challenge to Missouri's lethal injection protocol. Resp. 56–57. However, the deadline to amend the pleadings in that case was in January 2014, *before* Dr. Zivot examined Bucklew's medical condition. *Zink v. Lombardi*, No. 2:12-cv-04209 (W.D. Mo. filed Jan. 13, 2014) (ECF 271). Moreover, an as-applied challenge is not the same thing as a facial challenge, especially where, as here, the two claims are based on different facts. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016). Bucklew's as-applied claim, based on new facts and a different legal theory, was properly brought in a new action. J.A. 878–81.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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